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Supreme Court of the United States

October Term, 1971

No. 70-108 ~~1532~~

J. D. COX, SUPERINTENDENT OF THE VIRGINIA STATE PENITENTIARY,

Petitioner,

v.

LAWRENCE FURMAN SMITH,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE JUDGMENT OF THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

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LAWRENCE FURMAN SMITH,

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PRELIMINARY STATEMENT

James D. Cox, Superintendent of the Virginia State Penitentiary, prays that a writ of certiorari issue to review the final judgment of the United States Court of Appeals for the Fourth Circuit entered on December 8, 1970 in the case of *Lawrence Furman Smith* v. *J. D. Cox, Superintendent of the Virginia State Penitentiary.* A petition for rehearing was denied on January 12, 1971. On January 22, 1971, the mandate in the case was stayed upon application of the Superintendent.

OPINIONS BELOW

The memorandum order of the Supreme Court of Appeals of Virginia in the case of *Smith* v. *Cox,* decided on April 29, 1969, is unreported; it is noted at 209 Va. lxxxvii and is included herein as Appendix A (App. p. 1). The memorandum order of the United States District Court for the Eastern District of Virginia, Alexandria Division entered March 9, 1970, is not reported, but is included herein as Appendix B (App. p. 3).

The opinion of the court below is reported at 435 F.2d 453, and is also included herein as Appendix C (App. pp. 7). On January 12, 1971, the Court denied a petition for rehearing (App. p. 19).

JURISDICTION

The judgment for which review is sought was entered by the United States Court of Appeals for the Fourth Circuit on December 8, 1970. A petition for rehearing was denied on January 12, 1971. On January 22, 1971, an order was entered staying the mandate of the Circuit Court pending application in this Court for a writ of certiorari. The jurisdiction of this Court to issue the writ of certiorari is grounded upon 28 U.S.C. § 1254(1).

QUESTION PRESENTED

Should a habeas corpus petitioner be permitted to challenge collaterally the mental competency of the judge who sentenced him, when no objection was made at trial that the court was improperly constituted?

STATEMENT OF THE CASE

On December 8, 1964, in the Circuit Court of Hanover County, Virginia, Lawrence Furman Smith entered pleas of

guilty to two indictments charging robbery and burglary arising out of events occurring on August 2, 1964 at the J. R. Mills General Merchandise store in Hanover County. When the proof showed that Smith had been given access to the store by an employee, the burglary indictment was amended to allege larceny. At the conclusion of the trial, Smith was sentenced to eighteen years for robbery and ten years for larceny. An accomplice, Henry Clay Davis, was sentenced by the same judge on February 18, 1965 to ten years for robbery and two years for larceny arising out of the same incident which resulted in the charges against Smith.

An appeal from the original convictions was considered by the Supreme Court of Appeals of Virginia and denied on January 10, 1966. This appeal did not raise the allegation of the trial judge's incompetence, which was presented for the first time (along with several other allegations) in a petition for habeas corpus originally filed on September 26, 1966 in the Law and Equity Court of the City of Richmond and ultimately remanded by the Supreme Court of Appeals to the Circuit Court of Hanover County. Following a plenary hearing in the last named court the petition was dismissed on October 21, 1968. At the plenary hearing Smith was not permitted to subpoena or introduce evidence which would have substantiated his allegation that the sentencing judge was senile; said evidence would have consisted of records in the possession of the Clerk of the Supreme Court of Appeals of Virginia relating to the retirement for medical reasons in the summer of 1965 of the sentencing judge, Leon M. Bazile. An appeal from this dismissal was rejected by the Supreme Court of Appeals of Virginia on April 29, 1969. (See Appendix A.)

The federal petition was filed pursuant to 28 U.S.C. § 2241 in the United States District Court for the Eastern District of Virginia, Alexandria Division on February 12, 1970 and was denied without a plenary hearing on March 9, 1970. The petition alleged, *inter alia,* that the trial court was improperly constituted due to the senility of the trial judge and that the petitioner should have been afforded an opportunity to prove same at the state habeas hearing. The district court considered this claim frivolous and dismissed it, without further discussion, as "completely unsubstantiated factually and uncorroborated by anyone." (See Appendix B, App. p. 3.)

On appeal, the issue was presented in the context of whether Smith should have been permitted to introduce evidence relating to the trial judge's mental condition at the state habeas hearing. Thus the Fourth Circuit Court was squarely faced with the question presented here—whether the mental capacity of the trial judge could properly be litigated by collateral attack. The Fourth Circuit ruled that it could be, and remanded the case to the district court with directions that the issue be again presented to the state court for a determination on the merits of whether the sentencing judge was mentally competent. If it were found that he was not competent, Smith was to be resentenced by a competent judge.

ARGUMENT

The Ruling Of The Court Below Is A Departure From The Accepted Course Of Judicial Proceedings, Which Has Never Permitted A Challenge To The Qualifications Of The Court After The Case Is Concluded.

The superintendent does not deny the factual allegations raised by Smith and noted by the court below that the trial

judge resigned his office for health reasons within nine months after Smith's case ended, or that Smith's sentence was disproportionate to that of his co-defendant. These factual considerations, however, are not essential to the issue presented here. It is respectfully submitted that by permitting the issue of a judge's mental capacity to be litigated in a habeas corpus action, the court below may have opened the door to a barrage of litigation that could flood both state and federal courts in plenary hearings to determine the competency of their brother judges. Because of the possible scope of this decision, this Honorable Court should grant certiorari to prevent a departure from previously well settled law.

The superintendent has no quarrel with the circuit court's conclusion that due process requires that the determination of sentence be made by a mentally competent judge. It is submitted, however, that a challenge to judicial competence, like a challenge on the ground of interest or prejudice, should be permitted only if it is made in a timely manner—specifically, at time of trial or sentencing. In the two cases relied on by the court below as analogous to the instant case, *In Re Murchison,* 349 U.S. 133 (1955) and *Tumey* v. *Ohio,* 273 U.S. 510 (1927), the issues were presented to this Court on *direct* appeal from state court convictions in which timely objections were made at the trial to the qualifications of the judge. No case has been suggested, and none are to be found, in which the qualifications of a trial judge were allowed to be questioned on habeas corpus, either for interest, prejudice, mental competence, or any reason. On the contrary, it has long been settled that objections to a judge's qualifications for reasons of interest or prejudice may be waived if not asserted at trial. See, e.g., *Davis* v. *Cities*

Service Oil Co., 420 F.2d 1278 (10th Cir. 1970); *Adams* v. *U.S.*, 302 F.2d 307 (5th Cir. 1962); *Neil* v. *U.S.*, 205 F.2d 121 (9th Cir. 1953); *Coltrane* v. *Templeton*, 106 F. 370 (4th Cir. 1901).

It appears, therefore, that under the rule fashioned by the court below, a habeas petitioner will be able to obtain a plenary hearing merely by alleging that the trial judge was insane or senile. Of course the burden of proof would remain on the petitioner, but what standard would he have to meet to carry his burden and shift it to the state? Need he merely allege that the judge retired for health reasons or died of old age, or that his co-defendant received a shorter sentence? These are the only concrete allegations in the instant case, and there is no dispute of them as factual matter. It is not reasonable to assume that a reviewing court could conclude from these facts alone that the trial judge was incompetent at the time of trial, especially when the review must be made at a distance of several years. This is the best reason for requiring a timely challenge to the judge, regardless of the ground assigned as basis for disqualification.

Practical experience demands recognition of the fact that there are innumerable cases where one defendant received a longer sentence than his colleague for the same crime. Similarly, since judges are often appointed for life, there will be innumerable cases involving judges who have either died in office or retired late in life for health reasons. Presumably these judges, as well as all judges now sitting, will be the subject of allegations that the judge was incompetent. Moreover, this is only a part of the problem. It is only reasonable to assume that the rule must apply equally to federal judges as well as state, to civil cases as well as criminal, and to appellate judges as well as trial courts. Finally, is the habeas petitioner to be entitled to a free

psychiatric examination of the judge to support his allegations? Will the judge who rules on the sanity of his brother then be the subject of the same inquiry by the same disgruntled petitioner?

The court below noted that Smith could not be expected to have presented his allegations at the original trial because some of the facts were not in existence at that time. The only facts fitting that classification would be the circumstances surrounding the judge's retirement. Obviously the fact of the judge's senility had to exist at the time of trial if it is to be of any help at all to Smith. The record in the court below showed that the trial judge's eccentricities were well known to Smith's trial counsel, who did not think it proper at the time to issue a challenge to the judge, and that Smith was offered an opportunity to withdraw his guilty plea which he declined. These circumstances cannot be easily explained away by saying that Smith ran the risk of infuriating the judge by moving for his disqualification. While such an inference may be valid, it is nevertheless required by both state and federal courts that challenges to the trial judge must be timely. If a challenger's claim is meritorious, he is protected by his right to appeal from any vindictive judgment imposed by a judge who should have disqualified himself. Only by demanding timely objections can the courts insure finality of judgments and "forestall the spinoff of collateral proceedings that seek to probe murky memories." *Boykin* v. *Alabama,* 395 U.S. 238, 244 (1969).

CONCLUSION

Petitioner submits that the decision below should be reviewed because it represents a giant step in the field of post-conviction relief, and as such is a departure from the ac-

cepted and usual course of judicial proceedings. *U.S.S.Ct.R.* 19.

Respectfully submitted,

J. D. COX SUPERINTENDENT OF THE VIRGINIA STATE PENITENTIARY

By: ANDREW P. MILLER
Attorney General of Virginia

VANN H. LEFCOE
Assistant Attorney General of Virginia

Supreme Court Building
Richmond, Virginia 23219

CERTIFICATE OF SERVICE

I, Vann H. Lefcoe, Assistant Attorney General of Virginia, a member of the bar of the Supreme Court of the United States and one of counsel for the petitioner herein, do hereby certify that on this 31st day of March, 1971, I mailed a copy of the foregoing Petition for Writ of Certiorari by first-class mail to Parker E. Cherry, Esquire, Mutual Building, Richmond, Virginia, counsel for the respondent herein. All parties required to be served have been served.

VANN H. LEFCOE
Assistant Attorney General of Virginia

APPENDIX

APPENDIX A

VIRGINIA:

In the Supreme Court of Appeals held at the Supreme Court of Appeals Building in the City of Richmond on Tuesday *the* 29th *day of* April, 1969.

The petition of Lawrence Furman Smith for a writ of error to a judgment rendered by the Circuit Court of Hanover County on the 21st day of October, 1968, in a certain proceeding then therein depending, wherein the said petitioner was plaintiff and C. C. Peyton, Superintendent of the Virginia State Penitentiary, was defendant, having been maturely considered and a transcript of the record of the judgment aforesaid seen and inspected, the court being of opinion that there is no reversible error in the judgment complained of, doth reject said petition, and refuse said writ of error, the effect of which is to affirm the judgment of the said circuit court, which court shall allow court appointed counsel the sum of $150 as compensation for services rendered on this appeal, and also his necessary direct out-of-pocket expenses.

And it is ordered that the Commonwealth recover of the plaintiff in error the said amount paid counsel appointed to represent him on this appeal, his necessary direct out-of-pocket expenses, the costs to be taxed by the clerk of this court, the amount paid counsel appointed by the said circuit court to represent the said Lawrence Furman Smith therein, his necessary direct out-of-pocket expenses, and the costs to be assessed in this case by the clerk of the said circuit court.

A Copy,

Teste:

Howard G. Turner

Clerk.

By /s/ R. P. Tomlinson
Deputy Clerk

Costs due the Commonwealth
by plaintiff in error in
Supreme Court of Appeals:

Attorney's fee $150.00 plus his costs and expenses
Filing fee 1.50

Teste:
Howard G. Turner
Clerk
By /s/ R. P. Tomlinson
Deputy Clerk

APPENDIX B

ORDER

Lawrence Furman Smith, an inmate at the Virginia State Penitentiary, petitions this Court for a writ of habeas corpus. He attacks the legality of his conviction on December 8, 1964 in the Circuit Court of Hanover County wherein he pled guilty to felonious assault and robbery, and grand larceny. Sentences of eighteen years and ten years, respectively, were consecutively imposed.

This Court has had the benefit of all available records and trial transcripts pertaining to petitioner's convictions, and the same are hereby incorporated into and made a part of the record of this petition.

Smith contends his constitutional rights were violated in the following respects: His convictions for larceny and robbery constitute double jeopardy; he was denied equal protection of the law in that he received a total sentence of twenty-eight years while his accomplice only received twelve years for the same two offenses; he was denied a fair hearing due to the alleged senility and mental condition of the trial judge; his guilty plea was defective and involuntarily given; and he was denied effective assistance of counsel at trial and on appeal.

Petitioner has exhausted available state remedies as to all of these issues. 28 U.S.C. § 2254.

This Court finds each contention is without any merit in fact and in law.

Petitioner's claim of double jeopardy rests upon the fact that he was convicted for the robbery of the personal effects of an attendant at a storehouse and also convicted for stealing merchandise of the owner of the same storehouse. However, the offenses of robbery, 18.1-91, Virginia Code, and larceny, 18.1-100, Virginia Code, involve distinct ele-

ments of proof not required of the other. Since they cannot be considered identical crimes, there can be no double jeopardy. That both relate to and grow out of one transaction is of no consequence. See McGann v. United States, 261 F.2d 956 (4th Cir. 1958).

Also, petitioner cannot attack his sentence, well within the statutory limits, on the grounds he asserts:

> ". . . [T]he matter of sentence involves an individual judgment in the instance of each defendant; even in the same case, with multiple defendants, convicted of the same crime, individual factors may warrant, and often do, entirely different sentences. For this reason, due process and equal protection of the law 'do not mean equal sentences in criminal cases.' " United States ex rel. Resseguie v. Follette, 297 F.Supp. 1103 (S.D. N.Y. 1969).

The claim that the trial judge was physically disabled, thereby denying petitioner a proper hearing, is frivolous. It is completely unsubstantiated factually and uncorroborated by anyone.

As to his guilty plea, petitioner asserts it cannot stand because the trial judge failed to make a formal finding of guilt, the court did not fully advise him of the nature and effect of his plea, and the plea was not voluntary for it was induced by a promise allegedly made between his counsel and the judge that the sentence would only be eight years.

> "No particular form or ritual is required but it must appear that the defendant understood the consequences of his plea." Bailey v. MacDougall, 392 F.2d 155, 159 (4th Cir. 1968).

The transcript of the trial and the testimony taken at the

state habeas corpus hearing reveal petitioner fully comprehended the nature of the charges against him, and knew the effect of his guilty plea.

Although the trial judge did not ask him any questions or make an inquiry as to his understanding of the plea, both indictments were read to petitioner and he pled guilty after each one. Moreover, the court then proceeded as required under Virginia law, § 19.1-192, Virginia Code, to hear the witnesses and the evidence in the case in the presence of petitioner and his counsel. The plea was not made a nullity because the judge did not thereafter formally pronounce petitioner guilty. The order entered by the court did.

Equally important, on several occasions before the day he pled, petitioner went over all aspects of his case in detail with his retained counsel and was fully advised of his various rights. There is no evidence, as well, other than petitioner's assertion, that any promise was made concerning his sentence which would cast a doubt on the voluntariness of his plea. Gibson v. Boles, 288 F.Supp. 472 (N.D.W.Va. 1968).

Finally, the claims of ineffective assistance of counsel at trial and on appeal find no factual support whatsoever in the record. Petitioner's only real complaint with his trial lawyer, retained by his family, is that the court imposed a long sentence term. This does not constitute grounds for ineffective counsel. Gibson v. Boles, supra. The record shows petitioner was afforded full and competent appellate representation and none of his rights thereto were infringed.

Petitioner is lawfully incarcerated. His petition for a writ of habeas corpus is hereby denied.

The Clerk will send a copy of this order to the petitioner and the Attorney General of Virginia.

/s/ OREN R. LEWIS
United States District Judge

March 9, 1970

A True Copy, Teste:
W. Farley Powers, Jr., Clerk

By /s/ Betty Dobson
Deputy Clerk

APPENDIX C

OPINION OF THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

WINTER, Circuit Judge:

This is an appeal from the denial of a writ of habeas corpus by a state prisoner incarcerated for an aggregate term of twenty-eight years for conviction of robbery and larceny upon his pleas of guilty. After available state remedies had been denied, the writ was sought from the district judge, who found no merit in the contentions that the petitioner had been placed in double jeopardy by reason of conviction of both offenses, that petitioner's pleas of guilty were accepted without proper warning to him of their effect or proper inquiry as to whether he understood his constitutional rights, that he had been denied effective assistance of counsel, and that he was improperly denied the opportunity to prove that the state trial judge who sentenced him was senile and incapable of making an informed, fair judicial determination of the punishment that he should suffer. We agree with the district judge that petitioner's contentions with respect to double jeopardy, his plea and the quality of his representation are without merit, but we think that petitioner has been denied the opportunity to inquire into the fitness of the state trial judge to sentence him. We, therefore, vacate the judgment and remand the case to the district judge for further proceedings.

—I—

Petitioner's convictions arose out of these facts: On the evening of August 2, 1964, petitioner and an accomplice entered the J. R. Mills General Merchandise store, in Hanover County, Virginia, which was then in charge of an em-

ployee named Sam Edward Melton. The store was closed, but they gained entrance by saying that they wanted to purchase cigarettes. When Melton let them in, petitioner and his companion struck Melton and took $51.00 of his own money from his person. They also ransacked the store and took a safe containing several hundred dollars belonging to the owner, Mills.

Petitioner was apprehended and two indictments were returned against him. One charged burglary with the taking of money and chattels belonging to J. R. Mills. The other charged robbery of Melton with theft of $51.00 of his money taken from his person. When the proof showed that Melton gave access to the store the burglary indictment was amended to allege larceny.

Petitioner was represented by counsel, and he pleaded guilty to each indictment. He was sentenced to eighteen years for robbery and ten years for larceny. His accomplice was subsequently sentenced by the same judge to a total of twelve years for the same offense. Petitioner, in proper person, filed a notice of appeal, but counsel who had represented him at the trial had withdrawn. The court then appointed new counsel to represent petitioner on his appeal, but this attorney did nothing to perfect the appeal and permited the time to perfect it to lapse. Later, another attorney was appointed to represent petitioner, and was permitted to file a belated appeal. The Supreme Court of Appeals of Virginia denied the appeal. Petitioner then sought and was denied state habeas corpus relief.

— II —

First, we turn to petitioner's claim to have suffered double jeopardy. He argues that the offense of larceny of which he was convicted was a part of and included in the offense

of robbery for which he was also convicted, so that separate consecutive sentences for both crimes violated his right not to be placed in jeopardy twice. We disagree.

The double jeopardy clause does not prevent conviction and sentence at one trial for multiple offenses arising out of one transaction of criminal conduct, where each offense rests on different necessary elements. The clause can be violated by a single trial conviction only if all the elements necessary for conviction under one statutory provision are also necessary elements under the other. *Blockburger* v. *United States,* 284 U.S. 299 (1932); *McGann* v. *United States,* 261 F.2d 956 (4 Cir. 1958), *cert. den.,* 359 U.S. 974 (1959). See also *Gore* v. *United States,* 357 U.S. 386 (1958). Even in that case, the accused does not suffer double jeopardy unless he is convicted and sentenced under both statutes for the same acts; two separate criminal acts could constitutionally be punished twice under the same or identical statutes. *Blockburger* v. *United States, supra.*

In this case, separate elements were necessary for conviction under each of the two statutes applied. Robbery, under Virginia law, is a common law crime. While Code of Va. § 18.1-91 fixes the punishment for robbery, it does not define it. *Mason* v. *Commonwealth,* 200 Va. 253, 105 S.E. 2d 149 (1958). The common law, in effect in Virginia, defines robbery as "the taking, with intent to steal, of the personal property of another, from his person or in his presence, against his will, by violence or intimidation." *Pierce* v. *Commonwealth,* 205 Va. 528, 138 S.E.2d 28, 31 (1964). See also, *Mason* v. *Commonwealth,* 200 Va. 253, 105 S.E.2d 149 (1958); *Smyth* v. *White,* 195 Va. 169, 77 S.E.2d 454 (1953). Larceny, in Virginia, is also a common law crime, although it is regulated by statute. It is the taking of goods or chattels of another. *Cf. Satterfield* v. *Common-*

wealth, 105 Va. 867, 52 S.E. 979 (1906). The taking of $5.00 or more from the person of another or $50.00 or more not from the person of another, is grand larceny. Code of Va. § 18.1-100. All other larceny is simple larceny. Code of Va. § 18.1-101. The indictment and sentence in the case at bar indicate that petitioner was convicted of grand larceny.

It is readily apparent that the elements of the crime of robbery and grand larceny are different. Robbery involves violence or intimidation, while larceny does not. Larceny requires proof of amount, at least for purposes of maximum punishment, while robbery does not. The fact that the amount which must be proved is small and is in practice relevant only to the maximum sentence which can be imposed does not prevent its being a separate element of the crime. *Gore* v. *United States, supra,* indicates that separate elements suffice to save convictions at a single trial from invalidity even where the differences between the crimes charged are minor, and do not involve significant differences in the state interests involved. Here, the differences are more substantial.

Even if larceny were a lesser included offense in robbery, petitioner's convictions here would be sustainable on the grounds that two separate criminal acts were committed: the larceny of Mills' money and property and the robbery of Melton. Since each of these was a separate act on petitioner's part, and each independently offended a criminal provision, petitioner could have been convicted and sentenced for both of them at one trial even under a single statute. This is true despite the fact that the acts were committed proximately in time. See *Blockburger* v. *United States, supra.*

And even if petitioner's acts could have been treated as constituting the commission of a single crime on the theory that Melton was custodian of Mills' safe, its contents and

other merchandise, petitioner may not now claim that he was placed in jeopardy twice. Having pleaded guilty to the indictments, petitioner may not now go beyond the facts alleged therein and admitted by him and complain about how he may have been charged, or the theories under which he may have been convicted had he elected to stand trial on pleas of not guilty. We hold, therefore, that petitioner was not placed in double jeopardy, because he was charged and admitted to guilt of two separate offenses.

— III —

The taking of petitioner's pleas of guilty unquestionably did not comply with the formal requirements of *Boykin* v. *Alabama,* 395 U.S. 238 (1969), which requires the making of a formal record to demonstrate that the accused intelligently and knowingly pleaded guilty. Ordinarily it would seem that the record should be made by interrogation of the accused by the trial judge, by counsel, or by both. *Boykin,* however, has been held not to be retroactive, *United States ex rel. Hughes* v. *Rundle,* 419 F.2d 116 (3 Cir. 1969), and we agree. *Boykin's* holding is analogous to Rule 11, *F. R. Crim.* Pro. as interpreted in *McCarthy* v. *United States,* 394 U.S. 459 (1969). *McCarthy* was held not to be retroactive in *Halliday* v. *United States,* 394 U.S. 831 (1969), on the grounds that convictions based on pleas not voluntary or knowing could be reversed without reliance on the rule of *McCarthy,* and that retroactivity would be highly disruptive of the administration of justice, since large numbers of guilty pleas had been obtained without compliance with the *McCarthy* requirements. These considerations are equally applicable here. The purpose of *Boykin* was merely to forestall "the spin-off of collateral proceedings that seek to probe murky memories," 395 U.S. at 244. Even before

Boykin, it was constitutionally required that guilty pleas be entered with a knowledge of their consequences, see *Pennsylvania ex rel. Herman* v. *Claudy,* 350 U.S. 116, 120 (1956), and in this circuit the burden of proof of knowledge and understanding was on the state. *Bailey* v. *MacDougall,* 392 F.2d 155, 159 (4 Cir.), *cert. den.,* 393 U.S. 847 (1968). This requirement assures that a fair review of the guilty plea can be given without the disruption which would be produced by applying *Boykin* retroactively.

Under pre-*Boykin* standards, including those of *Bailey,* the acceptance of the guilty plea in this case was not erroneous. As we read this record, the district judge's finding that "petitioner fully comprehended the nature of the charges against him, and knew the effect of his guilty plea" is fully supported. Petitioner was represented by counsel from after return of the indictments through the plea and sentence. The indictments were read to him in open court; and, in accordance with Virginia practice, Code of Va. § 19.1-192, the witnesses and evidence against him were presented in his presence and in the presence of his counsel.

More importantly, petitioner's trial counsel testified at the habeas hearing that he investigated the case and conferred with his client on a number of occasions, that petitioner freely admitted his guilt and that petitioner was fully advised of his rights and the consequences of his pleas. Petitioner disputed none of this, except that he claimed that his plea was induced by his counsel's representation that an arrangement had been made so that petitioner would receive a sentence of eight years. Counsel, however, emphatically denied any such arrangement or any such advice to his client. A simple issue of credibility was raised, and we cannot say that it was incorrectly resolved by the state habeas judge or that the district judge should have overturned the state habeas judge's resolution.

— IV —

We see no merit in petitioner's contention that he is entitled to further relief because of ineffective assistance of counsel on appeal. His argument is two-fold. First, he argues that his first counsel, appointed to represent him on appeal, did nothing and permitted the appeal to lapse. Undoubtedly, this was ineffective representation, but this denial of petitioner's rights was subsequently redressed. New counsel was appointed, and application for a writ of error was prepared and filed. Although it was denied on the merits, it was considered out of time, and petitioner is entitled to no more. See *Shiflett* v. *Peyton,* ..... F.2d ..... (4 Cir. 1970); *Nelson* v. *Peyton,* 415 F.2d 1154 (4 Cir. 1969), *cert. den.,* 397 U.S. 1007 (1970); cf. *Cabaniss* v. *Cunningham,* 206 Va. 330, 143 S.E.2d 911 (1965). We note, furthermore, that even had the defect not been repaired, the prejudice to an accused from his counsel's failure to appeal is far slighter than usual where, as here, he was convicted on a plea of guilty. In such a case, the scope of review on appeal is severely restricted. *Roth* v. *Peyton,* Mem. Dec. No. 13,697 (4 Cir., May 12, 1970); *Peyton* v. *King,* 210 Va. 194, 169 S.E.2d 569 (1969).

Petitioner's second argument is that the second attorney who was appointed to represent him on appeal proceeded on the basis of the transcript of trial but did not confer with petitioner. In the light of *Anders* v. *California,* 386 U.S. 738 (1967), we conclude that counsel, appointed to represent an indigent appellant, ordinarily should consult with his client at least once to ascertain his client's desires with regard to the alleged trial errors which the appellant wishes to press, because counsel has a duty to press arguments initiated by his client which may arguably be supported, even though counsel does not personally espouse them. Ordi-

narily this consultation is more effective and efficient if it occurs in a personal interview, but circumstances may make this impossible so that resort to correspondence must be had.

But however desirable the procedure we suggest may be, we cannot say that it is one required by the Constitution. Moreover, petitioner does not suggest any arguments which should have been raised on appeal that cannot be dealt with on their merits in these proceedings. Their absence and the fact of the limited scope of review on appeal after pleas of guilty, lead us to conclude that a failure of the attorney to consult with petitioner does not amount to a denial of the constitutional right to the effective assistance of counsel.

— V —

Petitioner's contention with respect to the trial judge's competency to sentence him is grounded on the assertion, not disputed in argument, that the judge resigned his office within nine months after petitioner's case was terminated. The resignation, it is said, followed a complaint to the Governor about the trial judge's mental condition by a member of the grand jury which indicted petitioner and the filing of medical reports with the Virginia Supreme Court of Appeals. Under Code of Va. §§ 51-22, *et seq.* the Supreme Court of Appeals was at that time vested with authority to remove a judge on the ground that he had become mentally incompetent. The fact that petitioner received a sentence grossly disproportionate to the sentence imposed upon his codefendant who was of greater or equal guilt is stressed, and it is claimed that petitioner had no convictions more recent than sixteen or seventeen years prior to the crimes in question. Overall, it is argued that the inference that the trial judge had become mentally incompetent prior to petitioner's sentencing should be drawn, and petitioner should be afforded the opportunity to attempt to prove his contention.

Petitioner sought to raise this point in his initial state application for a writ of habeas corpus, alleging that he was entitled to relief because the court was not "properly constituted." This petition was denied by the trial court, but the denial was reversed by the Virginia Supreme Court of Appeals, which directed that petitioner be afforded a plenary hearing on the various issues he raised. Petitioner then filed an amended petition for habeas corpus. The amended petition adopted by reference the allegations of the original, but did not explicitly repeat the claim that the trial court had not been duly constituted. Petitioner's counsel also sought an order for the issuance of a subpoena duces tecum to require the production of the trial judge's medical records. The request was denied on the grounds that the competency of the judge was not raised in the petitions. Counsel declined to amend his pleading further, although at the hearing he lodged an objection on the record to the court's denial of an order directing the subpoena duces tecum to issue. When the amended petition for a writ of habeas corpus was denied after plenary hearing, petitioner appealed on the grounds, *inter alia,* that it was error to refuse to order the subpoena to issue and that the court below should have granted relief because the trial judge was in poor mental and physical health. The Supreme Court of Appeals refused to grant a writ of error, without commenting upon these grounds.

The application for a writ of habeas corpus to the district court specifically alleged a denial of due process because of the "senile and mental condition of the Presiding Judge at my trial . . ." The district judge, who did not grant a further hearing, apparently considered the allegation to be limited to physical disability. He dismissed the contention as "frivolous" commenting that it is "completely unsubstantiated factually and uncorroborated by anyone."

We have no doubt that the due process clause of the fourteenth amendment guarantees that the determination of sentence be made by a judicial officer mentally competent to carry out his duties. To permit a mentally impaired man to weigh the myriad considerations and to make the difficult choices involved in fixing a punishment—choices which often depend on insights into defendant's character and future behavior as well as conclusions as to the seriousness of the offense—would surely violate the standards of fair play established by the due process clause. Mental incompetence is at least as serious a defect as prejudice or interest on the part of a judge, both of which have already been held constitutionally impermissible. See *In the Matter of Murchison,* 349 U.S. 133, 136 (1955); *Tumey* v. *Ohio,* 273 U.S. 510 (1927). If in fact it can be shown that petitioner was sentenced by a judicial officer who, as a result of mental disease or physical disease adversely affecting his mental processes, was unable to comprehend, consider, or weigh the factors entering into the determination of an appropriate sentence, petitioner would be entitled to have his sentence vacated and to be resentenced by a judicial officer who was mentally competent. Failing this he should be discharged from custody.

Petitioner's claim to have been tried by a senile judge cannot be considered frivolous simply because no evidence has yet been brought on the issue. Petitioner has alleged the existence of specific facts to support his claim. He could hardly be expected to have presented them at the original trial. Some of them were not in existence at that time. Although petitioner could perhaps have succeeded in adducing his evidence at a state habeas hearing had his petitions been more complete, his errors in following state procedure do not amount to that "inexcusable neglect" which forecloses the introduction at a federal habeas hearing of evidence

not previously considered. See *Townsend* v. *Sain*, 372 U.S. 293, 317 (1963). Under these circumstances, *Townsend* requires an evidentiary hearing.

We conclude that the statements at the bar, coupled with the allegations made in various pleadings, warrant further exploration of whether petitioner's contention is well-founded. This sensitive issue of state administration of state criminal justice should be litigated in the first instance in the state courts. Although it appears that the state courts have not considered the issue on its merits because of petitioner's noncompliance with state procedural requirements, we have no reason to doubt that, if the contention is squarely raised, the state courts will be willing to afford the petitioner a reasonable opportunity to prove his case, including the right to supoena evidence, and to grant him relief if evidence to sustain it is adduced. To enable petitioner to litigate the question of the competency of the state trial judge to sentence him and, hence, to litigate the validity of his sentence, we vacate the judgment of the district court and remand the case to it for further proceedings. Upon remand, the district judge should stay the proceedings a reasonable period to enable petitioner to attempt to litigate these questions in the Virginia courts. In the event that the Virginia courts decline to consider the issue on its merits within a reasonable period, or having considered the issue on its merits, conclude that the petitioner is not entitled to relief, the district judge shall conduct such further proceedings as may be appropriate to determine whether petitioner has been denied due process of law.

Vacated and Remanded.

UNITED STATES COURT OF APPEALS
FOURTH CIRCUIT

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January 12, 1971

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No. 14,487—Lawrence Furman Smith v.
James D. Cox, etc.

Gentlemen:

Enclosed is a certified copy of an order denying the petition for rehearing.

Sincerely yours,

SAMUEL W. PHILLIPS, Clerk

By /s/ Carol R. Lemon
(Mr.) Carol R. Lemon
Chief Deputy Clerk

CRL/vsl
Enclosure

ORDER

The petition for rehearing having been read and considered and no judge in active service having suggested a rehearing en banc, it is, with the concurrence of Judge Haynesworth and Judge Bryan, ORDERED, that said petition is hereby denied.

For the Court:

/s/ Harrison L. Winter
United States Circuit Judge